IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT ROBINSON — APPELLANT

VS. — NO. 2010-CA-1120-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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ROBERT ROBINSON **APPELLANT**

VS. **NO. 2010-CA-1120-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Robert Lee Robinson was convicted of four counts of possession of a controlled substance as a second and subsequent offender. Following his conviction, he was sentenced to serve a term of thirty years in the custody of the Mississippi Department of Corrections and received a one million dollar fine as to Count I, possession of ecstasy as a second and subsequent offender. Under Count II, possession of cocaine, Robinson was sentenced to eight years and a fine of $100,000, to run concurrent to the sentence imposed in Count I. Robinson was additionally sentenced under Count III, possession of marijuana, to a term of three years and a

$6,000 dollar fine, to run concurrent to the sentence imposed in Counts I and II. Finally, Robinson was sentenced under Count IV, possession of Alprazolam, to a term of one year and a fine of $1,000 to run concurrent to the sentences imposed in Counts I, II, and III. From his conviction, Robinson appeal[ed], requesting review of whether the trial court erred in denying Robinson's motion for JNOV, or in the alternative, a new trial.

The Court of appeals of the State of Mississippi denied all relief and affirmed the verdict of the jury and sentence of the trial court. *Robinson v. State,* 967 So.2d 695 (Miss.App. 2007).

The Mississippi Supreme Court granted defendant's application for post-conviction relief. The petition was to be filed in the Circuit court of Bolivar County with the court to conduct an evidentiary hearing on the same. (Order of Supreme Court of Mississippi, Cause No. 2008-M-01768, filed January 15, 2009).

On April 6th, 2010 the hearing was held, and on June 1, 2020 the an order was filed denying relief which constituted of extensive findings of fact and conclusions of law. (C.p. 85-103)

This instant appeal was timely noticed. (C.p.104).

STATEMENT OF FACTS

¶ 3. Robinson was driving from his home in Memphis, Tennessee, to Cleveland, Mississippi, on March 2, 2005, in his white Oldsmobile Cutlass. Robinson drove to Cleveland, Mississippi, to meet his alleged business partner, Joe Moore, and pick up $2,400 in cash to help open their planned restaurant.

¶ 4. After Robinson picked up the cash he made his way back to Memphis, Tennessee, traveling north on Highway 61. Robinson was subsequently stopped for speeding* by state trooper Dan Rawlinson. Rawlinson testified that when he approached the vehicle he detected a raw marijuana smell emanating from the car, and that the car had an expired inspection sticker. Rawlinson further testified that he received permission to search the car for contraband. Once Rawlinson began the search, he found a large sum of cash in the console, but no illegal contraband. Rawlinson then testified that he asked permission to search the trunk and Robinson informed him he would have to get a warrant first. After calling for backup, Rawlinson determined that the vehicle identification number on the inside of the driver's door had been stripped and did not match the car description.

¶ 5. Responding to Rawlinson's call, Officer Jacob Lott arrived at the scene with his canine, Masai, to check for the presence of drugs in the car. Masai alerted twice that he detected the presence of drugs in the car on both the driver and passenger's sides of the vehicle. Rawlinson then searched the trunk of the vehicle, where he found a black overnight bag containing cocaine, marijuana, ecstasy, and a drug which appeared to be Xanax.

¶ 6. At trial, Robinson testified that he had no knowledge that the black bag or the drugs were in his trunk. Robinson's nephew, William Wilson, testified that he found the bag while he was playing basketball and took the bag and placed it in his uncle's trunk, without Robinson's knowledge. Wilson testified he planned to take the bag the next morning and sell the drugs, but his uncle left before he had a chance to retrieve the bag from the trunk.

Robinson v. State, 967 So.2d 695 (Miss.App. 2007).

* As the trial judge also noted in his order denying post-conviction relief – According to the officer who stopped the Robinson's vehicle, Robinson was speeding, ***there was a possible tint violation and no inspection sticker.*** (Trial court order, fn.1, C.p. 85).

SUMMARY OF THE ARGUMENT

Issue I.

THE INDICTMENT WAS SUFFICIENT TO CHARGE A CRIME IN COUNT I

The indictment, in Count I, specifically cited the statute down to the subsection which specifically and in correct chemical nomenclature informed defendant of the drug he is charged with illegally possession.

Issue II.

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO OBJECT TO THE SENTENCE OF THE TRIAL COURT.

Under Strickland failure to object to a sentence (even an illegal sentence) is not ineffective assistance when there is no prejudice.

Issue III.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COUNSEL'S MOTION TO SUPPRESS THE EVIDENCE OF THE SEARCH.

Under Strickland failure to raise the issue of evidence suppression where the evidence adduced at trial is not ineffective assistance.

Issue IV.

DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE HE CANNOT FULFILL THE FEDERAL HABEAS CORPUS REQUIREMENTS.

When a defendant has no Constitutional right to counsel on appeal there can be no claim of Constitutionally ineffective assistance of counsel.

ARGUMENT

Issue I.

THE INDICTMENT WAS SUFFICIENT TO CHARGE A CRIME IN COUNT I.

While the State would wish this issue were barred... such apparently (save for guilty pleas) is not the case. Even though this issue was never raised pre-trial, at trial, in the motion for new trial, on direct appeal, or in the petition for post-conviction relief to the Mississippi Supreme Court. It was not mentioned (though other issues were added) in the petition filed with the trial court, nor was it mentioned or alluded to during the post-conviction evidentiary hearing, And now, it is raised by asking this reviewing court to invoke the 'plain error' doctrine (even though the 'plain error' is identified, distinctly specified and argued in the brief...) of M.R.A.P. Rule 28(a)(3).

Be that as it may, this Court has seen this issue, similarly situated, and opined:

> ¶ 9. Therefore, it would appear at first blush that Mangum's motion should be barred based upon the Legislature's ability to set reasonable limitations upon post-conviction proceedings, the tardiness of Mangum's motion, and the fact that it is a successive writ three times over. However, without mention of Cole or the Legislature's discretion to set reasonable limitations upon a defendant's right to voice his grievances, constitutional, or otherwise, the supreme court recently made clear in Jackson v. State, --- So.3d ----, ---- (¶¶ 24, 34) (Miss.2010) that a challenge to the sufficiency of an indictment "is not waivable and is excepted from the [Act's] procedural bars" as it infringes upon a defendant's right to due process. Additionally, in Rowland v. State, 42 So.3d 503, 507-08 (¶ 12) (Miss.2010), the supreme court reiterated its stance "that errors affecting fundamental constitutional rights are excepted from the procedural bars of the [Act]." As such, because this Court is obligated to follow the pronouncements of the supreme court,

we reach the merits of Mangum's motion.

B. Sufficiency of Mangum's Indictment
¶ 10. The issue of whether an indictment is fatally defective is a question of law and warrants a broad standard of review by this Court. *Nguyen v. State*, 761 So.2d 873, 874 (¶ 3) (Miss.2000). As such, our review is de novo. Peterson v. State, 671 So.2d 647, 652 (Miss.1996) (superceded by statute).

¶ 11. An indictment must contain all the essential elements of the crime charged in order for a defendant to be properly convicted. [. . .]

Mangum v. State, 2010 WL 4484379 (Miss.App. 2010)

Without waiving any conceivable bar to review, the State would argue the indictment is sufficient to charge a crime in Count I.

The case of *Copeland v. State*, 423 So.2d 1333 (Miss. 1982) is cited as being on point and controlling. At first blush they do in fact seem identical. Same drug involved and in both indictments there was the omission of the critical citation to "3, 4-" before the chemical name in the schedule of controlled substances.

At the time of Robinson's crime, the specific statutory provision read:

Miss. Code Ann. § 41-29-113(c)(4):
3, 4-methylenedioxymethamphetamine (MDMA)

The indictment itself in Court I in tracking the language of the statute did omit the "3, 4-" of the specific chemical name. However, the exact statutory sub-section was cited – ... Section 41-29-113(c)(4) ... was specifically cited in Count I.

The State would argue there is no 'plain error' as the indictment sufficiently

puts defendant on notice of his crime. Notice so specific, it essentially informs him that the charge is for possession of – by reading the specific statutory section – possession of "3, 4-methylenedioxymethamphetamine (MDMA)." Miss. Code Ann. § 41-29-113(c)(4)(As amended 1981).

> ¶ 21. The indictment, while not repeating the statute verbatim, was sufficient to inform Perkins of the crimes with which he was accused. Although Counts VI, VII and VIII of the indictment did not repeat the statute verbatim, each count contains the number of the statute (97-3-53), which gave Perkins ample notice of the crimes with which he was charged. See Gray v. State, 728 So.2d at 70 (¶ 171).
>
> *Perkins v. State*, 863 So.2d 47, 54 (Miss. 2003).

It is the position of the State the citation to the specific statutory code correctly identified the chemical in question, including the "3, 4-" required by *Copeland.*

Hoping this issue barred, but in the alternative, this issue is without merit as the statutory cite to the very exacting language of the statute provided clear and ample legally sufficient notice to inform defendant of what he was charged with posessing.

No relief should be granted on this claim of error.

Issue II.

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO OBJECT TO THE SENTENCE OF THE TRIAL COURT.

Counsel for defendant is somewhat amiss in arguing "The30-year sentence of the Appellant is based upon constructive possession and he should have been entitled to a proportionality analysis.

The correct, or better summation would "defendant's sentence (not the evidentiary basis of the conviction) was based upon statute and defendant's own past criminal record as a second and subsequent offender.

Shining that light on the issue clarifies considerably. As a consequence defendant is not entitled to a *Solem* proportionality analysis.

> ¶ 26. The Supreme Court has subsequently altered its interpretation of Solem. The Eighth Amendment does not contain a proportionality guarantee. Harmelin v. Michigan, 501 U.S. 957, 965, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Severe penalties are not, by themselves, violative of the Eighth Amendment. Id. at 994-95, 111 S.Ct. 2680. Before we will make such comparisons, White must meet the threshold requirement of showing the sentence imposed is grossly disproportionate to the crime charged. Hoops v. State, 681 So.2d 521, 538 (Miss.1996). Unless White satisfies this preliminary requirement,*1036 he is not entitled to the extended *Solem* comparison analysis. Id.
>
> *White v. State,* 919 So.2d 1029 (Miss.App. 2005).

So, there is no right to a proportionality analysis, nor were the sentences illegal. There was no reason to object... and the sentence given was not even the max

possible. Even now there is not one showing or claim of disproportionate sentence to the crime committed.

Further, not one allegation of prejudice. Consequently, *Stickland* has not been met as to either prong.

> ¶ 40. Generally, the decision to make certain objections falls within the realm of trial strategy and is not grounds for a claim of ineffective assistance of counsel. Spicer v. State, 973 So.2d 184, 203 (Miss.2007). In the instant case, however, we cannot say that trial counsel's failure to object falls within the realm of trial strategy, as Parker's trial counsel should have objected to such error by the trial court.
>
> ¶ 41. Nevertheless, Parker fails to show on appeal how such conduct by the trial counsel prejudiced his case.

Parker v. State 30 So.3d 1222, 1233 (Miss.,2010)

In Parker, there was error in the sentence. Counsel didn't object. Defendant raised as claim of ineffective assistance. And, even though it was an erroneous sentence, failure of counsel to object was not ineffective assistance.

Here there was not error in sentencing, no objection, and certainly not ineffective assistance.

The trial court was correct in his order denying relief as he more than adequately dealt with this issue.

No relief should be granted on this allegation of error.

Issue III.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COUNSEL'S MOTION TO SUPPRESS THE EVIDENCE OF THE SEARCH.

Well, the trial court dealt with this issue squarely and succinctly based upon his knowledge, the evidence adduced at the evidentiary hearing and the law at issue. (Order denying post-conviction relief. (C.p. 92-94,Order denying post-conviction relief, para. 15-20).

> ¶ 21. With our holding in Harrison squarely before us, we now return to the facts of today's case, which we find likewise involves a mistake-of-law issue. From the totality of the record before us, we conclude that Officer Moulds had an objective, reasonable basis for believing that Moore was in violation of the law for driving a vehicle on a public street with only one operative tail light.FN5 In other words, based on the totality of the circumstances with which Officer Moulds was confronted, including a valid, reasonable belief that Moore was violating a traffic law, Officer Moulds had sufficient probable cause to pull Moore over, although, as it turns out, Officer Moulds based his belief of a traffic violation on a mistake of law. It necessarily follows from the record before us that, consistent with our discussion of cases from this Court, the United States Supreme Court, and certain federal circuit courts, the search of Moore's vehicle which produced, inter alia, the Hi-Point .380 caliber handgun, was lawful. Had Moore's case gone to trial, the trial court would not have committed error by allowing the handgun into evidence. Thus, Moore's trial counsel cannot be found to have rendered ineffective assistance by failing to file a motion to suppress this evidence
>
> Moore v. State 986 So.2d 928, 935 (Miss. 2008).

Such is the case we have here. The facts were clear, there was no rationale basis for the trial attorney and certainly not on appeal to make any such claim. Trial

counsel nor appellate counsel were deficient. Further, there is no claim or showing of how defendant was prejudiced.

No relief should be granted on this claim of error.

Issue IV.

DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE HE CANNOT FULFILL THE FEDERAL HABEAS CORPUS REQUIREMENTS.

Lastly, it would appear defendant asserts it was ineffective assistance of counsel because by failing to file for appellate review in State court, defendant is barred from seeking federal habeas review.

The federal court have heard this said same claim via petition for habeas corpus and held:

The Right to Counsel on a Motion for Rehearing

> Jackson asks us to hold that he received ineffective assistance of counsel on direct appeal because his attorney failed (1) to file a motion for rehearing or, alternately, (2) to inform Jackson of his right to file such motion pro se. Jackson cannot have received constitutionally deficient counsel on his motion for rehearing, however, if he had no constitutional right to counsel for purposes of filing a rehearing motion.FN21 "A criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals." FN22 When a state grants a criminal defendant an appeal of right, the Constitution requires*365 only that the defendant's claims be "once ... presented by a lawyer and passed upon by an appellate court." FN23 Not only does a motion for rehearing come after the appellate court has passed on the claims; there can be no question that the granting of a motion for rehearing lies entirely within the discretion of a court of appeals. Rehearing at that point is by no means an appeal of right.
>
> We conclude that a criminal defendant has no constitutional right to counsel on matters related to filing a motion for rehearing following the disposition of his case on direct appeal. We therefore affirm the district court's denial of Jackson's application for a writ of habeas corpus.

> *Jackson v. Johnson,* 217 F.3d 360, 364-365 (C.A.5 (Tex.),2000) (footnotes omitted).

The trial court in his order denying relief specifically adopted the rationale and holding of *Jackson, supra.* (C.p.99-102, Order denying post-conviction relief, para. 29-33).

The State would assert the trial court applied the correct legal standard in denying relief based upon ineffective assistance of trial counsel.

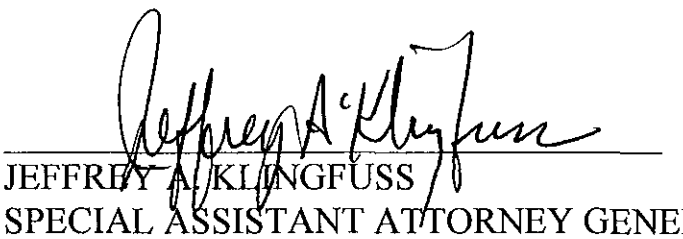
Consequently, no relief should be granted based upon this assignment of error.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

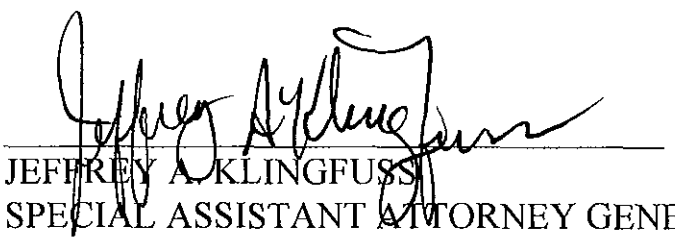
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Charles E. Webster
Circuit Court Judge
Post Office Drawer 998
Clarksdale, MS 38614

Honorable Brenda Mitchell
District Attorney
Post Office Box 848
Cleveland, MS 38732

James D. Minor, Sr., Esquire
Attorney at Law
Post Office Box 1670
Oxford, MS 38655-1670

This the 7th day of March, 2011.



JEFFREY A. KLINGFUSS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680